BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JESSE J. ATKINS Claimant V. **WEBCON** Respondent AND **KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND** Insurance Carrier	)	Docket No. 1,047,783

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 31, 2014, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on December 2, 2014. Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Roy T. Artman of Topeka, Kansas, appeared for respondent.

The ALJ found claimant's June 16, 2009, accident arose out of and in the course of his employment with respondent, and respondent had timely notice of the incident. The ALJ wrote:

> Where employment requires travel from place to place in the discharge of the employee's duties, an injury which occurred while traveling is an exception to the "going and coming rule." [Citations omitted.] In *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951), the Court held that when a business trip is an integral part of the claimant's employment the "entire undertaking is to be considered from a unitary standpoint rather than divisible."[1]

The ALJ determined travel was an intrinsic part of claimant's job, and his injuries arose as a result of the risk of said travel. Further, the ALJ found claimant entitled to future

[1] ALJ Award (July 31, 2014) at 4.

medical treatment upon proper application and unauthorized medical care up to the applicable statutory limit.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues claimant's accidental injury did not arise out of and in the course of his employment. Respondent contends claimant faced no greater risk than the general public at the time of the accident. Further, respondent argues claimant was a fixed-situs employee while working in Enid, Oklahoma; therefore, travel was not an intrinsic part of claimant's job because at the time he was "simply a laborer on commercial roofing projects."[2]

Claimant contends the ALJ's Award should be affirmed. Claimant argues travel was an intrinsic part of his employment, and he was in Oklahoma at the time of the accident for the business purposes of respondent. Moreover, claimant maintains the working trip to Oklahoma should be viewed as indivisible, and an injury occurring during any aspect thereof is compensable.

The issue for the Board's review is: Did claimant's accidental injury arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Respondent is a commercial roofing company based in Hutchinson, Kansas. The jobs respondent performs are located in various places, many occurring far from Hutchinson. In June 2009, respondent had a large project in Enid, Oklahoma, replacing a grain elevator roof. This project took several months and employees were given the option to temporarily relocate.

Tim Lemen supervised the crew for the Enid project. He explained the crew would meet at respondent's shop in Hutchinson each Monday morning and travel together in company vehicles to Enid. The crew would arrive in Enid later that morning and work at the job site Monday afternoon and all day every day thereafter until midday Friday, when they returned to Hutchinson for the weekend. Employees were given a $25 per diem for overnight stays in addition to their base hourly wage, and if the project was completed in a timely fashion, they would also receive a bonus.

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[2] Respondent's Brief (Sept. 8, 2014) at 11.

Mr. Lemen testified the crew would meet each morning around 6:00 or 7:00 a.m. while in Enid before traveling in company vehicles to the job site, located approximately 5-10 minutes from the hotel. The workday varied in length dependent on the day's activities, but usually the crew finished by 6:00 or 7:00 p.m. The workday began when the crew got into the vehicles and ended when they arrived back at the Baymont Inn. Respondent chose and paid for the hotel where the crew stayed.

Respondent provided Mr. Lemen with a company credit card to pay for lunch and dinner for the crew. Respondent also provided transportation in the form of company vehicles. Mr. Lemen stated employees could ask him for permission to use one of the company vehicles to run errands. Mr. Lemen testified employees could choose to take a personal vehicle to Enid instead of riding with the crew, but respondent would not have reimbursed for fuel or mileage. He stated no one ever chose to drive a personal vehicle on out-of-town jobs.

Mr. Lemen, as foreman, decided which employees would travel to certain jobs. He stated these jobs were voluntary. Employees were not forced to work out-of-town, unless willing to do so. However, Mr. Lemen agreed he would decide which employees comprised the traveling crew if there were no volunteers for a job.

Robert Webster, respondent's operations manager, testified a crew of approximately 8 to 12 employees was sent to Enid on any given week. He stated a core group of employees was always sent on large or difficult jobs, though respondent allowed them to occasionally remain in Hutchinson or have time off if necessary. Mr. Webster noted claimant was a member of the core group. He testified:

> Q. And if you had guys that didn't want to go, you know, they didn't want to be out of town for a week, were they required to go?
>
> A. Depends on who they were.
>
> Q. So the core workers you talked about, you really wanted them on the project?
>
> A. Yes.[3]

Claimant, a general laborer, worked on the Enid project for the duration until he suffered an accident on June 16, 2009. Claimant testified he does not recall much of the date of accident other than going to work and having dinner with the crew the previous evening. Nick Wittekind, claimant's coworker, testified he and claimant walked to the nearby Ramada Inn following dinner. The Ramada Inn, located about two blocks and across the street from the Baymont Inn, had a bar with dart boards. Mr. Wittekind stated Mr. Lemen did not dictate what the crew did in the evenings unless a company vehicle was

[3] Webster Depo. at 7.

required. Mr. Wittekind was with claimant at the bar until 11:30 p.m., when he returned to the Baymont Inn. Claimant remained at the bar after Mr. Wittekind left.

On June 16, 2009, claimant was struck by a drunk driver while walking from the Ramada Inn bar to the Baymont Inn at 2:25 a.m. He sustained numerous injuries and was life-flighted to OU Medical Center, where he remained in a coma and on a ventilator for nearly two months. Claimant's injuries resulting from the accident required extensive treatment, including multiple surgeries and an amputation of the right leg above the knee. Claimant awakened from his coma shortly before he was discharged from OU Medical Center on September 4, 2009. Claimant was transferred to Promise Regional Medical Center in Hutchinson, Kansas, for rehabilitation, where he remained for approximately two months before moving to Meadow Brook in Gardner, Kansas, for additional rehabilitation. Claimant has not worked since June 15, 2009.

The ALJ issued a preliminary hearing Order dated February 24, 2010, finding claimant's accident arose out of and in the course of his employment with respondent. Respondent appealed the Order to the Board. A Board Member, in an Order dated April 21, 2010, wrote:

> This member of the Board has considered the parties' arguments and concludes the ALJ's Order should be affirmed. First, this Member disagrees with respondent's contention that the well established exceptions to the "going and coming" rule are no longer meaningful precedent. The integral travel and special purpose findings in the reported judicial cases were simply judicial determinations that the "going and coming rule" was not applicable because the workers in those cases were in the course of employment when the accidents occurred. Stated another way, the workers were not on the way to work because the travel itself was a part of the job. . . . And like the ALJ noted, "[w]hen travel is considered part of the job, the hazards associated with the duties of the job continue beyond, in this case, those associated specifically with roofing." [Citation omitted.] Thus, under these facts, once claimant left Hutchinson, Kansas with his coworkers to travel to Enid, Oklahoma, claimant assumed the duties of his job and the entire undertaking is an indivisible one.[4]

PRINCIPLES OF LAW

K. S. A. 2008 Supp. 44-508(f) provides in pertinent part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the

[4] *Atkins v. Webcon, Inc.*, No. 1,047,783, 2010 WL 1918591 (Kan. WCAB Apr. 21, 2010).

> duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

ANALYSIS

The ALJ applied the intrinsic travel exception as a basis for finding the June 16, 2009, accident arose out of and in course of claimant's employment. The Board disagrees. While Kansas courts have long recognized an exception to the "going and coming" rule where travel is an intrinsic part of the employee's job,[5] travel was not intrinsic in claimant's work with respondent.

The facts in this case are akin to *Butera v. Fluor Daniel Const. Corp.*[6] In *Butera,* the claimant was a pipe fitter whose employer (Fluor Daniels) temporarily relocated him from his home to Kansas to work on a nuclear power plant. He was on his way to work when he was involved in a serious motor vehicle accident. In this case, the claimant was temporarily relocated to quarters in Enid, Oklahoma, a city close to the work site. The Court in *Butera* wrote:

> Travel itself was not part of Butera's job as a fitter, as it would be when one's job is to pick up a crew or visit accounts. Butera relocated to temporary quarters for the sole purpose of shortening his commute. While he was reimbursed for the hotel, he was not specifically reimbursed for his reduced commute once he relocated to the hotel residence. His off-hours activities were not under Fluor's supervision, and he was not expected to accomplish anything on behalf of Fluor during his off-time. Butera, at the moment he was injured, faced no greater risk than other commuters who were traveling from their permanent residence. Similarly, Fluor did not enjoy some benefit over and above what it would have received had Butera been a local resident.[7]

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[5] See *Scott v. Hughes,* 294 Kan. 403, 414, 275 P.3d 890 (2012); citing *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006); *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 277, 899 P.2d 1058 (1995).

[6] *Butera v. Fluor Daniel Const. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] *Butera, supra,* at 546-547.

The Board reached a similar result in *Ostmeyer v. The Right Solutions.*[8] The claimant in *Ostmeyer* suffered an off-duty injury during a 13-week temporary work assignment, during which she stayed in a hotel, at her own expense, near the location of the assignment. The Board in Ostmeyer wrote:

> At the time of her assault, claimant was on her own time. She was doing nothing in furtherance of her employer and was engaged in personal activities. She was not exposed to any increased risk as a result of her employment. Travel is not an inherent component of her job, regardless of her title as a "traveling nurse."

The Kansas Supreme Court, in *Angleton v. Starkan, Inc.*,[9] stated:

> The two phrases, arising "out of" and "in the course of" the employment, as used in our workmen's compensation act (K.S.A.1972 Supp. 44-501), have separate and distinct meanings, they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[10]

The ALJ and claimant cite *Blair v. Shaw*[11] in support of a finding that all injuries occurring during periods of travel or temporary relocation are compensable. In *Blair,* the claimant was required by his employer to travel from Fort Scott, Kansas, to Pittsburg, Kansas, to take an automobile certification test. After the examination, the claimant was killed in an automobile accident on his way home to Fort Scott. Finding the case compensable, the Supreme Court stated:

> The decedents went to Pittsburg with the knowledge and consent of their employer, on gasoline furnished by it. While the evidence does not show they were specifically

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[8] *Ostmeyer v. The Right Solutions*, No. 1,030,022, 2009 WL 298341 (Kan. WCAB January 30, 2009) *aff'd*, *Ostmeyer v. Amedistaff, L.L.C.*, No. 101,909, 220 P.3d 593 (Kansas Court of Appeals unpublished opinion filed Dec. 11, 2009).

[9] *Angleton v. Starkan, Inc.*, 250 Kan. 711, 828 P.2d 933 (1992).

[10] *Angleton, supra,* at 717-718; citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[11] *Blair v. Shaw,* 171 Kan. 524, 233 P.2d 731 (1951).

> directed or instructed to go, yet it is clear the annual trip to Pittsburg to take the examination was so well-established as to amount to a custom of the employment. Mechanics expected to take the examinations and knew that their employers expected them to do so. We have no difficulty in concluding that the trip to Pittsburg to take the examination was, under all of the facts and circumstances disclosed by the evidence, incidental to and actually a part of decedents' employment within the meaning of the compensation act, and therefore that their fatal injuries arose out of and in the course of their employment.[12]

Unlike this case, the claimant in *Blair* was traveling from an event that was a customary part of the employer's business and beneficial to the employer. The Supreme Court in *Butera* labeled travel in cases like *Blair* "special-purpose trips taken on behalf of the employer."[13] Just as in *Butera*, this case involves a fixed-situs employee. The Court in *Butera* wrote:

> A fixed-situs employee does travel to the job site in order to perform the business of the employer, but the Act excises this activity from the scope of compensation in order to keep the employer's burden manageable.[14]

Claimant was not at work in his employer's service at the time of his injury, nor did his injury arise out of the nature, conditions, obligations or incidents of his employment with respondent. Claimant's work day ended when he was delivered to the Baymont Inn. Claimant's time spent at the Ramada Inn bar had no connection to his employment. Respondent received no benefit from claimant spending time at a bar and walking back to his room at 2:25 in the morning. Claimant was not engaged in a custom of his employment or activity contemplated as work-related by respondent.

The respondent is not the absolute insurer in all cases where travel occurs. In *Ostmeyer* the Court of Appeals wrote:

> Finally, to embrace Ostmeyer's position here would substantially broaden the employer's exposure for such claims. If Ostmeyer's injuries arose out of and in the course of employment, virtually any conceivable mishap during her hotel stay would be compensable — even a slip and fall in the hotel shower or food poisoning from a local restaurant. We do not believe such broad coverage to be consistent with legislative intent or with the appellate case law considering such questions.[15]

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[12] *Id.* at 528.

[13] *Butera, supra,* at 548.

[14] *Id.* at 546.

[15] *Ostmeyer v. Amedistaff, L.L.C.* at 4.

The Court of Appeals, in *Ostmeyer,* also stated "travel to and from fixed-situs employment does not fall within the Kansas Act,"[16] noting that employees who work at fixed sites are not included in the traveling salesman rule in order to keep the employer's workers compensation burden manageable.

CONCLUSION

Butera and *Ostmeyer* apply to the facts in this case. Claimant did not suffer an injury arising out of and in the course of employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 31, 2014, is reversed. Compensation for claimant's June 16, 2009, injury is denied.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge

[16] *Id.* at 3, citing *Butera*, 28 Kan.App.2d at 546.